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IN THE SUPREME COURT OF THE

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

vs.

ROOSEVELT PEABODY,

Defendant-Petitioner.

PETITION FOR

WRIT OF CERTIORARI

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DECISION BELOW

This is a petition addressed to the sound discretion of this Court to review the unpublished Order of the United States Court of Appeals for the Seventh Circuit dated April 15, 1977, petition for rehearing and suggestion for rehearing in banc being denied May 13, 1977, which Order denied petitioner's appeal from a judgment of conviction entered by James L. Foreman, U.S. District Judge for the Eastern District of Illinois, entered May 3, 1975. The petitioner was sentenced to the custody of the Attorney General for a period of two years and fined Five Thousand Dollars ($5,000.00).

JURISDICTION

The petitioner was convicted of violating 18 U.S.C. §1951, (Count II) a conspiracy charge. He was also charged with violating 18 U.S.C. §1961 (Count 21), however, the trial Court granted the petitioner a new trial as to the latter charge on the ground that there was a fatal variance between the charge contained in the indictment and the proof adduced at trial.

The trial Court in an Order dated August 13, 1975, denied petitioner's motion for new trial as to 18 U.S.C. 1951 (Count II). Since that charge is the only one for which the petitioner stands convicted, the petition herein is addressed solely to it. (Subsequent to May 13, 1977, the date the Seventh Circuit Court of Appeals denied the petitioner's motion for rehearing and suggestions for rehearing in banc, the respondent dismissed Count 21 of the indictment which charged a violation of 18 U.S.C. 1961.)

The April 15, 1977, Order of the Court of Appeals for the Seventh Circuit entered is included in the appendix hereto. The petition for rehearing was denied by the Seventh Circuit May 13, 1977.

This Court has jurisdiction to review the April 15, 1977, Order of the Seventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1254.

QUESTIONS PRESENTED FOR REVIEW

I. THE BASIC QUESTION PRESENTED FOR REVIEW IS WHETHER OR NOT THE PETITIONER WAS PREJUDICED AND THUS DENIED DUE PROCESS BY BEING MADE TO STAND TRIAL ON ONE CHARGE WHEN THE PROOF WITH RESPECT TO ANOTHER CHARGE BEING TRIED SIMULTANEOUSLY VARIED FATALLY FROM THE INDICTMENT.

II. THE SECOND QUESTION PRESENTED FOR REVIEW IS WHETHER OR NOT THE PETITIONER WAS JOINED PREJUDICIALLY WITH OTHER DEFENDANTS, AND WHETHER, AS A RESULT OF SURPRISE TESTIMONY THE PETITIONER SHOULD HAVE BEEN SEVERED DURING THE TRIAL.

STATEMENT OF THE CASE

Petitioner stands convicted of having conspired to violate 18 U.S.C. § 1951. Charles Merritts, Hary Tharp and Fred Kimbrough were alleged co-conspirators, however, each was found guilty of also having violated 18 U.S.C. § 1961. Merritts and Kimbrough were also convicted of other charges.

Petitioner was tried jointly with the above named alleged co-conspirators, and also with Leonard Johnson, who was charged and convicted of violating 18 U.S.C. § 1951, § 1962, perjury and mail fraud, and Raymond Cason, who was charged and convicted of violating 18 U.S.C. § 1951, § 1962 and perjury.

Merritts, Kimbrough, Tharp and petitioner were elected members of the Board of Education of Illinois School District 189 which is located in East St. Louis, Illinois and its environs. Tharp and petitioner were elected to the Board in April 1974 and indicted on the charges herein in October

1974.

Johnson and Cason were the Business Manager and Purchasing Agent, respectively of District 189. Each had been employed by the District for a substantial period of time prior to April 1974 when petitioner was elected to the Board.

Petitioner and Merritts, Kimbrough and Tharp were charged with having conspired to extort property from vendors doing business with District 189 (Count 11). Petitioner was also charged with engaging in a pattern of racketeering in violation of 18 U.S.C. 1961 (Count 21). Merritts, Kimbrough, Tharp, Johnson and Cason were also charged along with petitioner with having violated 18 U.S.C. § 1961 (Count 21).

Originally, there were 21 counts of the indictment involving seven different defendants, however, the trial Court, at the suggestion of the Government and over the opposition of the petitioner, separated Counts 8 and 11 through 21 from the other counts for trial. All defendants except Phillips were tried as a result of this separation, and all defendants tried were found guilty on all counts.

Following the trial, petitioner filed a motion for a new trial claiming surprise during the course of the trial at certain evidence offered by the Government concerning alleged substantive criminal offenses with which petitioner had not been charged, and the Government filed an affidavit supporting petitioner's claim of surprise.

The affidavit filed by the Assistant U.S. Attorney who tried the case contains the following statement:

> "Until Kammermeyer testified at trial, the Government was not aware of (a) a $500 payment to Cason to be divided between Peabody and Tharp; or (b) of any golf clubs being given to Peabody; or (c) of Peabody's obtaining of a calculator and

> recorder in early May from Kammermeyer subsequent to the conspiratorial meeting."

The trial judge granted petitioner's motion for a new trial with respect to Count 21 but denied his motion as to Count 11 contending that the surprise evidence could be construed as overt acts.

On November 12, 1974, the trial Court entered a pretrial discovery order which provided in part:

> "(3) If additional discovery or inspection is sought, defendant's attorney shall confer with the appropriate Assistant United States Attorney within ten (10) days of the arraignment with a view to satisfying these requests in a cooperative atmosphere without recourse to the Court. The request may be oral or written and the United States Attorney shall respond in like manner."
>
> * * *
>
> "(5) Any duty of disclosure and discovery set forth above is a continuing one and the United States Attorney shall produce any additional information gained by the government."

On February 6, 1975, a motion was filed by the petitioner seeking a separate trial on the ground that he would possibly call one or two of the co-defendants. On that same date the petitioner also filed motions to dismiss the indictment for improper joinder of defendants and transactions.

The Government's chief and only witness against the petitioner with respect to the substantive charges was James Kammermeyer, who testified that before he had ever met petitioner he gave defendant Cason $500 to be divided between petitioner and defendant Tharp, that he bought a set of golf clubs for petitioner but couldn't recall when

he bought them or to whom he gave them, and that he gave petitioner a calculator and tape recorder at a meeting which petitioner allegedly attended at which James Kammermeyer and Kimbrough allegedly discussed "kickbacks."

Petitioner vigorously objected to evidence related to any conversation between Kammermeyer and Cason regarding the alleged $500 payment, however, this testimony was admitted on the "joint enterprise" theory, that is, since Cason and petitioner were both charged with violating 18 U.S.C. §1961, otherwise hearsay testimony was admissible against the petitioner.

During his opening statement, Assistant United States Attorney, Strellis, told the jury, "Where Mr. Peabody talked about getting a dishwasher and dryer for his personal advantage." Petitioner's counsel expressed surprise, and asked that the indictment be dismissed or that a mistrial be granted on the basis of the opening statement of the Government because the Grand Jury minutes showed that Kammermeyer had told the Grand Jury that petitioner had allegedly asked where he could get a good buy on a washer and dryer and that this had been left out of the Government's opening statement.

Later in the trial, the petitioner renewed his motion for a mistrial or in the alternative that the indictment against him be dismissed as follows:

"MR. WELCH: Your Honor, may I renew my motion for a mistrial on behalf of the Defendant Peabody, or in the alternative that the indictment against him be dismissed, based upon a deliberate misrepresentation by the government in its opening statement to the jury. I have before me the evidence of the transcript of the testimony of James Kammermeyer, Jr. that was presented to the Grand Jury on or about October 22, 1974. This is the only evidence that I have been provided with in connection with what this man is going to say. I have not interviewed him or anything else like that. Now I want to read to you a question and an answer that

is not taken out of context. Question: Mr. Peabody requested from you a washer and dryer and TV set? Answer: --now this answer is by Mr. Kammermeyer - 'Well, he said he wanted a good buy on a washer and dryer, but he also needed a TV set but everybody said that.' Now the government has stood before this jury and deliberately said that Mr. Peabody in the context of Tharp allegedly being given golf balls -- golf clubs - at a value of $400. and that Mr. Peabody begged for a washer and dryer - asked or was trying to get as a kickback a washer and a dryer when that testimony simply does not sustain that. Now Judge, I cannot -- why should I be put to the burden of correcting his opening statement? It is known what that evidence was.

THE COURT: Well, they have got to prove it.

MR. WELCH: But Your Honor, wait a minute. The prejudicial effect of that sitting up there before that jury, how can you eradicate that from their minds? That's what I am saying. It's in their minds now, and how can it be eradicated. It's unfair - it's unfair, Your Honor, and it's not a matter of just proving it. I can understand some things where they prove this and because of this they have to prove that. But when you get up and try to create the impression in the minds of the jury that a man did one thing when the evidence clearly shows - it never should have been brought out unless it was going to be brought out correctly. That's what's unfair about it, Your Honor. I am talking about basic fairness here.

THE COURT: Do you want to respond to it?

MR. STRELLIS: Well, Your Honor, I think the testimony will support my statement - my opening statement."

During Kammermeyer's examination the Court observed: "Well, it's hard for me, as extensive a discovery as you have here, where all of the way from the tapes that anybody could be surprised in this proceeding. MR. WELCH: Well, I am. I am surprised."

Counsel for petitioner was specific in stating that he was surprised at Kammermeyer's testimony that he gave $500.00 to Cason to give $250.00 to Tharp and $250.00 to petitioner. He stated that he had talked to the United States Attorney, his assistants, petitioner and Cason and this is the first occasion that he had ever heard of it. He further stated that he had talked to counsel for Cason, and to Cason, and that Cason was willing to swear in an affidavit that he did not give $250.00 to petitioner nor did he receive $250.00 to give to petitioner.

Counsel for petitioner also objected on the grounds that it was not alleged that petitioner had engaged in any sort of conspiracy action with Cason and that the transaction would be hearsay as to petitioner unless Count 21 was a conspiracy count where the evidence against one would be evidence against all.

Petitioner moved for a severance on the basis of the alleged $250.00 payment to Cason allegedly for petitioner and on the ground that it was a surprise. The motion was denied.

In discussing whether or not the Government had proved its case sufficient to sustain a motion for dismissal at the end of the Government's case, the Assistant United States Attorney stated: "Mr. Peabody, we have again specifically limited the proof to Section 1951 which would involve Count 11 of this indictment, and also the receipt of other property, namely a calculator and tape recorder which Mr. Kammermeyer testified he gave at the May meeting." In response to this position, counsel for petitioner stated:

"MR. WELCH: Your Honor, I am almost at a position where I am almost speechless after the government has stated its position with respect to Count 21 as it relates to the Defendant Peabody, and I say that in all candor. All along I think we have been led to believe that the substantive counts, 8, 11, 12, 13, 14, 15 - the other counts - and the allegations contained therein would be the

sum and substance of Count 21. Your Honor, I am at this point in time unprepared to defend the Defendant Peabody against the allegations contained in Count 21. When the government tells the Court that it is using as substantive evidence the fact that Mr. Kammermeyer testified that Mr. Peabody allegedly received a tape recorder and he allegedly received a calculator. I have gone through the Grand Jury minutes. I have gone through the statement provided to the FBI. I have gone through every single document that the government has provided in connection with this case on more than one occasion. I did not then nor do I now see anything relating to the alleged receipt of a tape recorder or a calculator. As a matter of fact, even as late as the opening statement the allegation was supposed to have been in connection with a washer and dryer. Now I am being perfectly candid about this, Your Honor. I cannot defend him in view of the government's now stated position, and I think the Court will acknowledge that throughout it was discussed in terms of the substantive allegations of those counts which had been joined, so that we had a specific date, a specific time, a specific item that was supposed to have been done. Now we are being-told that as evidence of guilt of 21 and as a substantive element of that guilt we are being told a tape recorder and calculator. But yet nowhere has that information been provided and I think the government would agree that nowhere in that discovery material is that found. Not a single place, and I cannot defend and ought not be required to defend to that, Your Honor, and I urge the Court to dismiss it as to Mr. Peabody."

In further discussing this matter the following occurred:

"MR. WELCH: Your Honor, before you leave, I would like to ask the Court to reconsider or rule on the Defendant Peabody's motion to dismiss Count 21, both as to the lack of proof and both as to the question of fairness, and I will be perfect-

ly candid with you, Your Honor. I do not have any knowledge and did not have any knowledge of any of those allegations relating to property prior to this time, and I am not prepared to go ahead. I don't think the Court ruled on that.

THE COURT: As to what?

MR. WELCH: On my motion to dismiss as to Peabody on the grounds of surprise or grant me a continuance as to that motion.

THE COURT: On Count 21?

MR. WELCH: Yes, as to that charge.

THE COURT: Well, Ed, I have held him in here on this other, and if he is in on the other, he has got to be in on 21. [emphasis added]

MR. WELCH: No, I don't think that's the government's theory. He is in on 11, on 21 he is in only because he allegedly received the recorder and calculator. Am I not right, Mr. Nester?

MR. SCHWARZ: No, not only - he is also in because of his involvement in the conspiracy.

MR. WELCH: Well, that's what I understand. Let me repeat - if he is in because of what is alleged in 11, that would be one thing. But the government is saying he is in the Count 21 because of what is alleged in 11, plus and in addition to the receipt of the tape recorder and the calculator which they alleged, and I am saying if that plus that the government is contending that puts him in Count 21, and I am saying that I didn't know about that, and I think the government will tell you that I didn't know about it. But for the plus I would not be in Count 21, and I think that's the government's position. Am I right, Mr. Nester?

MR. NESTER: The government concedes that we have to prove two counts - two criminal acts that are enumerated under 1962. That would be the activities under the racketeering.

MR. APOIAN: And the same thing would be true for Mr. Tharp. Isn't that correct?

MR. NESTER: Yes, sir.

MR. WELCH: So I don't know about it - see, I didn't know about the alleged illegal activity

of the tape recorder and the calculator. I did not know about it, Judge. I honestly did not know about it.

THE COURT: Well maybe -- Ed, I want to go ahead. I'm going to deny your motion and you have got it in the record and if you are truly surprised and there is some explanation or lack of explanation for that, then that's there. [emphasis added]

MR. WELCH: Well, could the government state its position, Your Honor, so we'll have it?

MR. SCHWARZ: Well, we stated the position. We have got to prove both of these things.

MR. WELCH: About my knowledge.

MR. SCHWARZ: I would be willing to state that I don't think Ed had knowledge of the tape recorder or the calculator before the trial. I don't know that he did. How about you, Mike?

MR. NESTER: I don't know. To be perfectly candid, I don't know.

MR. APOIAN: And the same thing would be true about the golf clubs for Mr. Tharp.

MR. SCHWARZ: No. Mr. Tharp is in there a whole lot deeper than Mr. Peabody is.

MR. WELCH: Your Honor, please - please don't make up - I ask the Court, please don't just rule for the sake of ruling so that we will have to go through this. I think the Court ought to consider the argument being made and I honestly represent to this Court that I never understood nor knew that there was a plus factor in there.

THE COURT: Well Ed, the problem with that is - you want me to make an inquiry as to whether you should have or where we are on that.

MR. WELCH: I did everything in my power to find out what was allegedly given to Peabody, and I was told that he was not given anything except what's in the discovery - it's in the discovery - and I'm representing to the Court that nothing in the discovery was about any tape recorder or calculator. That's what I am representing to the Court. That is what I am saying to the Court. I think I deserve more than that, Your Honor. I

think I deserve more than that. I am asking the Court to give me more than that.

THE COURT: Well, the only way I could do it would be to go through the discovery, Ed, to see about that.

MR. WELCH: Well, I asked the Court to reconsider it and asked the Court to go through it. I will provide the discovery through one of the clerks. It's only four or five pages of Grand Jury testimony and his statement to the FBI - that's all it is - there are other records, but none of that is alleged. And I am being perfectly honest and I think the government - it probably came as a surprise to the government to be perfectly honest about it. That's why I asked the Court to please fill me out on Count 21.

THE COURT: I deny your motion." [emphasis added].

The Court in its written Order of August 13, 1975 found that: "Counsel for defendant Peabody reiterated throughout the trial his surprise as the evidence disclosed certain other instances of misconduct on the part of Peabody. Counsel for defendant Peabody seems to acknowledge that he knew of the allegations of the washer and dryer prior to the time of trial, but that he was unaware of the golf clubs, the $500 payment and particularly the calculator."

"The Court feels that the introduction of evidence of other acts of misconduct on the part of Peabody constituted a fatal variance as to Count XXI and that Peabody was truly surprised thereby." (Appendix)

Thus, petitioner detrimentally relied upon representations concerning discovery and was misled by circumstances beyond the control of the Government, the Court or the petitioner.

During the course of argument for the motion for a new trial the Government indicated that the alleged receipt of the items of property by petitioner were in fact overt acts which were admissible with respect to Count 11. In that

connection, the Government stated for the first time: "Yes, Your Honor, the government anticipated and thought that it could bear its burden of proof of convicting the defendant, Mr. Peabody, guilty beyond a reasonable doubt in reference to Count 21 by the two substantive acts of Count 11 and also the solicitation or attempt to obtain the washer and dryer. But during the course of the trial other criminal acts were testified to by Mr. Kammermeyer and the government felt that with reference to Count 11 since it was a conspiracy -- a conspiracy was charged and those other substantive acts could be also termed overt acts with reference to Count 11, that in fact they were admissible and would not be prejudicial."

The petitioner did not have an opportunity to indicate to the Probation Officer his version of what occurred in view of the fact that a new trial for Count 21 was pending. Therefore, imposing sentence on Peabody the Court was unable to take into account Peabody's version of what occurred. Peabody specifically objected to the unreadiness for sentencing and his objection in that regard was overruled.

ARGUMENT

The petitioner strongly urges that the Courts below failed to properly apply the decision of this Court in Stirone v. United States, 361 U.S. 212, 4 L.Ed.2d 250, 80 S.Ct. 270 (1959), and the Order appealed from is in substantial conflict with the Second Circuit's holding in United States v. Baum, 482 F.2d 1325 (2d Cir. 1973), United States v. Echeles, 352 F.2d 892 (7th Cir. 1965), and United States v. Shuford, 454 F.2d 772 (4th Cir. 1971).

In order to fully understand the development of the sequence of events in connection with this case, it is important to note the differences in the Government's position as the facts developed.

The Indictment

With respect to Count 21 the Government alleged in the indictment that petitioner along with the defendants, Tharp, Kimbrough and Merritts, conspired to affect commerce "by obtaining property from James W. Kammermeyer, Jr." and that the defendants had "conspired to receive money that they were not entitled to" in consideration of their official acts as School Board Members. The Count 11 further provided that as an overt act petitioner along with defendants Tharp and Kimbrough travelled to Kammermeyer's office in St. Louis where an alleged discussion took place conerning kickbacks, and that in July 1974 petitioner, Merritts and Kimbrough discussed kickback payments that were to be made to James W. Kammermeyer.

Government's Opening Statement

In its opening statement the Government stated that Count 11 of the indictment charges petitioner, Merritts, Kimbrough and Tharp with obtaining or conspiring to obtain money under color of official right in receiving money that they were not entitled to in consideration of their official acts.

The Government also made reference to the alleged trip by petitioner, Tharp and Kimbrough to Kammermeyer's office and the alleged discussions that took place. Reference was also made to an alleged telephone call from Washington,D.C. to Mr. Merritts and that everybody was allegedly present, namely, Merritts, Tharp and petitioner, and a discussion took place concerning kickbacks. Finally, the Government stated that there would be evidence "where Mr. Peabody talked about getting a dishwasher and dryer for his personal advantage."

Government's Position at Close of Government's Case

After the testimony was in, the Government in seeking to sustain its burden of showing that it had submitted a prima facie case stated with regard to Count 21: "Now in regard to the government's proof in this matter, that we must prove at least as the statute requires, at least

two racketeering activities.... Mr. Peabody, we have again specifically limited the proof to Section 1951 which would involve Count 11 of this indictment, and also the receipt of other property, namely a calculator and tape recorder which Mr. Kammermeyer testified he gave at the May meeting."

Upon stating its position regarding the alleged receipt by petitioner of a calculator and recorder in connection with Count 21, the attorney for petitioner stated that he was virtually speechless in that he was not prepared to defend petitioner against the allegations contained in Count 21 because none of the documents nor the indictment itself had indicated anything about an alleged recorder or calculator and that the allegation was supposed to have been in connection with a washer and dryer. Counsel for petitioner reiterated his request to the Court that Count 21 be dismissed. In addition to asking that the count be dismissed, counsel for petitioner asked that a continuance be granted as to Count 21 because of the incorporation of the alleged receipt of the recorder and calculator in Count 21. Motions for continuance or dismissal of Count 21 were denied and petitioner was kept in the trial.

Government's Closing Argument

In its closing argument the Government talked about the May 1974 meeting. The Government stated in connection with Count 11 that the evidence allegedly showed that petitioner mentioned to Kammermeyer that gifts had been provided for other School Board Members and Kammermeyer said he "looked around his office and provided a calculator for Mr. Peabody." Further in its closing argument the Government stated with respect to Count 21: "The two violations again must be only with reference to Section 1951. Those would be Count 11, the conspiracy to violate 1951, and also the other property that he received which was on the date of the meeting in May 1974 at World Wide Industries. The testimony of Mr. Kammermeyer was that he gave Mr. Peabody a

calculator. ..."

In addition, the Government in its closing argument referred to the alleged conversation between petitioner and Mr. Kammermeyer concerning the washer and dryer (which Mr. Kammermeyer admitted he told the Grand Jury petitioner had asked for a good buy) and in connection with all of such testimony the Government testified that the receipt of property induced under color of official right would be the violation.

In referring to defendant Tharp the Government stated that he would be in the same category as petitioner and that in that connection the Government referred to Kammermeyer's testimony about Cason having said that Kammermeyer's reputation for making kickbacks was low and that he should "make a token payment of $250.00 both to Mr. Tharp and Mr. Peabody. The testimony is that in fact Mr. Kammermeyer gave this $500.00 to Mr. Cason for these two individuals. ..."

Argument on Post Trial Motion

At the post trial motion the Government argued that the receipt of the calculator and recorder were made overt acts with respect to Count 11 and therefore did not constitute an amendment to the indictment and petitioner was not required to receive notice of same.

Thus, although the Government contemplated when it originally drafted the indictment, as stated by the Government at the hearing on the post trial motion, that Count 21 would only embrace evidence concerning the alleged statement by Mr. Peabody that he wanted to get a good buy on a washer and dryer, and the allegations concerning the alleged conspiracy as alleged in Count 11, the fact is that the Government in resisting petitioner's effort to have Count 21 dismissed at the close of the Government's case, and prior to petitioner having an opportunity to testify, or in the alternative the attempt by petitioner at the close of the Government's case to have the matter continued on the grounds of surprise, the

Government took the position that Count 21 did in fact embrace the receipt of the calculator and tape recorder and that the Government was in fact relying upon same. In other words, at the juncture the Government did not take the position that the calculator and tape recorder constituted overt acts which were allegedly proof of a conspiracy.

In addition, in its closing argument, the Government specifically made reference to those things allegedly received by petitioner at the May 1974 meeting as being items which were unlawful. It was only after the Government was required to admit that this testimony concerning the calculator and tape recorder, as well as the alleged monetary gift to Cason allegedly for petitioner and golf clubs, constituted a surprise that the Government took the position that these items were all overt acts with respect to Count 11 rather than substantive matters which would be proof of a violation of Count 21. But at that point it was too late for the Government to take the position that these were but overt acts since petitioner had been kept in the trial with respect to Count 21, and he was denied a continuance on Count 21, on the basis of the Government's representation to the trial Court that the calculator and recorder were in fact a part of the illegal property allegedly received by petitioner as a substantive act constituting a violation of Count 21.

It is crystal clear that the Government may not amend an indictment by introduction at trial of proof of a substantive crime not charged in the indictment. Stirone v. United States, 361 U.S. 212, 4 L.Ed2d 252, 80 S.Ct. 270 (U.S. 1959). Thus, defendant petitioner was in fact tried on Count 21 for the substantive offense of receiving a calculator and tape recorder when such items were not and could not have been within the contemplation of the Government, the Grandy Jury or anyone else. Therefore, this constituted an amendment of the indictment and violated the principle set down in Stirone.

Standards for reversal where there is a variance between the allegations and the proof include whether or not the defendant was warned sufficiently to prepare an adequate defense so as not to be surprised at trial and whether or not such trial would provide adequate protection against double jeopardy.

Clearly, petitioner was surprised with respect to the allegation concerning the calculator and recorder. (Calculator and computer are used interchangeably since they were used interchangeably at the trial, but the fact is that Peabody allegedly received two different items at the May 1974 meeting).

In addition to the element of surprise, and the record fully supports the trial Court's finding in his Order granting petitioner a new trial as to Count 21 that petitioner was in fact surprised by such allegations, there is the question of jeopardy presented.

If petitioner takes the stand and admits the receipt of these two items, he could be possibly indicted on the grounds of a substantive violation of 18 U.S.C. §1951.

In addition, it would appear that the Government should have agreed at the close of its case that the surprise items in question could not constitute and would not constitute any evidence against petitioner and then petitioner would have been in a position to defend himself against the charges in Count 11.

It should be pointed out that under the discovery rules in effect in this case and the practice in the trial Court, the Government fully discloses its "entire files" to defendants in order to avoid problems of surprise. That is why all parties rested comfortably on the representation that all evidence of substantive offenses had been made known to all the parties. That is why the Government without hesitation indicated the surprise nature of Kammermeyer's testimony. Thus, regardless of any motion which would have been

filed prior to the trial, there is nothing that could have been done to prevent from occurring what in fact occurred, that is, Kammermeyer testifying about substantive offenses which Kammermeyer had never disclosed to the Government prior to trial and therefore which the Government had not disclosed to petitioner.

In that context, it was impossible for petitioner to present a defense as to these matters since he was unaware of either the factual existence of such claims, and also of the legal import of such claims. The entire occurrence had a chilling effect on petitioner. Thus, if the Court had granted a continuance or dismissed Count 21, then petitioner would have been able to defend himself against Count 11, including the alleged overt acts. That is in essence what petitioner requested at the end of the Government's case when he moved that Count 21 be dismissed so that he would know exactly what the charges were against him and his explanation for all that occurred could be given.

The fact that petitioner did not and could not take the stand and defend himself was more than a tactical question; in essence it was a determination that no person should be made to stand trial on substantive offenses for which he could be punished substantially without knowing the exact nature and import of the consequence of his testimony. In other words, if petitioner had taken the stand he could well have placed himself in jeopardy of new charges on the basis of matters about which he did not know. Had he taken the stand and ignored the surprise items, that is the alleged calculator, recorder, $250.00 payment, and golf clubs, the jury could very well have concluded that he in fact received them.

In United States v. Baum, 482 F.2d 1325 (2d Cir. 1973), the Court reversed the conviction where the Government had failed to disclose a witness to the defense. The counsel for the defendant in that case had asked for a continuance in order to pre-

pare for cross examination of the surprise witness but the Court denied such continuance after it was found that the defendant's counsel had the witness' criminal record.

The Court stated that the trial judge was confronted with the hard choice of interrupting the trial or denial to the defense of a reasonable opportunity of meeting the severe impact of the non-disclosed witness' testimony. It cited United States v. Kelley, 420 F.2d 26 (2d Cir. 1969), for the proposition that Government conduct which smacks of a trial by ambush in violation of the spirit of the rules should not be tolerated. The Court held that since the case was close the defendant should be given the benefit of the doubt rather than allowing the Government to reap even the slight possibility of benefit which it regarded as unworthy of a prosecutor.

In the instant case, at the trial and throughout, petitioner has not accused the prosecutor here of being unworthy. At the trial, it was recognized the very strong probability that the Government itself was surprised by the testimony of Kammermeyer. However, if the holding of the United States in Dennis v. United States, 384 U.S. 855, 16 L.Ed.2d 973, 86 S.Ct. 1840 (1966), is to have any meaning insofar as disclosure of Grand Jury testimony, then it appears absolutely clear that parties must be able to rely upon the disclosed material. Otherwise, the cardinal purpose of such cases as Dennis would be lost. A contrary rule would encourage the possibility of essential information being withheld from Grand Juries or defendants in order that the trial by ambush might once again become the order of the day rather than the non-tolerated exception.

The Sixth Amendment to the United States Constitution provides that the accused shall enjoy the right "to be informed of the nature and cause of the accusation."

If that Sixth Amendment right is to have any meaning, then clearly it must have meaning in the

instant case since petitioner was never accused of receiving a calculator or a tape recorder or $250 prior to the trial. Such an accusation was not even made to the Government by Kammermeyer and that is why this Court should not permit a possible unscrupulous witness to take advantage of this great judicial system by disclosing to Government officials whatever information he wishes and when he wishes knowing full well the consequence of such disclosures. (Kammermeyer was granted immunity.)

There is not simply a matter of the Government disclosing the evidence it has available to it to a defendant; rather, this is a matter where both the Government and the defendant are surprised as a result of testimony by a witness. What is claimed is that under the circumstances when the developments occurred as they did and when it became crystal clear to all parties that there was a material difference in what was to be claimed at the trial insofar as substantive offenses were concerned, then petitioner should have been granted either a continuance or a dismissal of Count 21. The state of uncertainty which remained by keeping petitioner in the trial with this surprise material having been offered against him created so much doubt that the defendant Peabody, contrary to the guarantees of the Sixth Amendment of the United States Constitution, could not defend himself because he did not know the full scope and nature of the accusations against him and therefore did not receive a fair trial.

In essence the trial Court recognized its error when petitioner was granted a new trial as to Count 21, however, it was then too late for the petitioner to defend himself against Count 11.

Finally, evidence which was admissible only by virtue of petitioner and Cason being both charged in Count 21 was used to prove "overt acts" for a charge of conspiracy of which petitioner stands convicted. Thus, petitioner stands convicted on the basis of clearly inadmissible evi-

dence as to him.

The second issue presented is whether the trial Court once having been alerted to severance problems should have granted the petitioner a severance notwithstanding the fact that the trial was in progress.

Petitioner attempted to sever himself from the other defendants because he felt an absolute necessity of calling to the stand certain Board Members including those Board Members who were defendants on trial and who had served on the Board prior to April 1974, that is, specifically defendants Merritts and Kimbrough with respect to the operation of the Board. In addition, petitioner did not under any scope of the case wish to be in a position where he would withhold or attempt to withhold from the jury relevant background information which would enlighten the jury as to the acts of petitioner.

The evidence revealed absolutely no connection between petitioner and the defendant Cason (record does not show that they even knew each other), and therefore there was no basis for joining Cason and Peabody in the trial since they are not alleged to have participated in any type of common activity, except as to Count 21 for which petitioner received a new trial.

The judge's duty to sever continues at every stage of the trial. Thus, in Schaeffer v. United States, 362 U.S. 511, 4 L.Ed2d 921, 80 S.Ct. 945, this Court stated that: "The trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." 362 U.S. at 516.

When it appeared to the trial Court that the defendant Cason had allegedly been the recipient of $500.00 from witness Kammermeyer for distribution to petitioner and Tharp, and where defendant Cason had indicated to his counsel and to counsel for petitioner his willingness to file an affidavit to the effect that he had not received any such payment from witness Kammermeyer and

had not given any such money to petitioner, then it appears that a severance should have been granted so as to give petitioner an opportunity to call the defendant Cason to the stand.

This problem is the type of situation which arose in United States v. Echeles, 352 F.2d 892 (7th Cir. 1965), where a defendant advised the Court that his lawyer had not suggested that false testimony be given but yet the lawyer was indicted and tried for such charge along with said defendant. The Court held that in such circumstance a severance should have been proper even though the witness may not have actually testified at the trial. The Court stated: "Thus, Echeles could not properly call Arrington as a witness during Echeles' case in chief. For if Arrington declined to take the stand, as was his right, Echeles' action in calling him and forcing him to decline to do so in front of the jury would have injected prejudicial error into the record as to Arrington. In De Luna v. United States, 308 F.2d 140, 141, 1 A.L.R. 2d 969 (5th Cir. 1962), wherein it was held that the defendant has the constitutionally guaranteed right of silence free from prejudicial comments, even when they came only from co-defendant's attorney, the Court said in language applicable here: 'If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately.'

"The Government further contends that Echeles' position in support of his motion for severance necessarily involved indulgence in two speculative assumptions: First, that Arrington would be tried prior to Echeles, and secondly, that Arrington would not claim his Fifth Amendment privilege against self-incrimination if called as a witness in the trial of Echeles. As for the first such 'assumption', we do not feel it would have been egregious had the trial judge, after

granting the motion for separate trial, also directed the Government to proceed first with the case against Arrington.

"With regard to the question of whether or not Arrington would claim the privilege if he were called as a witness during the trail of Echeles alone - a trial held subsequent to his own - we can only say that such question was not properly the Government's to interpose. Speculation about what Arrington might do at a later Echeles trial undoubtedly would be a matter of some concern to Echeles, but he should not be foreclosed of the possibility that Arrington would testify in his behalf merely because that eventuality was not a certainty. ... Moreover, it would in fact seem more likely than not that Arrington would have testified for Echeles for the reason that three times previously, in open Court, Arrington had voluntarily exculpated Echeles, apparently contrary to his own penal interest."

Here, as in Echeles, it is clear that there developed at the trial testimony concerning an allged payment by witness Kammermeyer which was to be delivered to petitioner. This was very prejudicial to petitioner in two respects, firstly, it came as a surprise to him, and secondly, he was not present when the alleged payment was made and was hearsay as to him. The hearsay character of the testimony arose from the fact that Cason allegedly told Kammermeyer that his reputation was bad and that he needed to make the payment.

One could hardly suggest that if Cason had made such a suggestion and not given the money to petitioner then he would have done so for his own benefit and therefore in a position antagonistic to petitioner. In such circumstances it would still be improper for petitioner and Cason to stand trial together.

In United States v. Shuford, 454 F.2d. 772 (4th Cir. 1971), one defendant when tried with another refused to take the stand for reasons of his own but had indicated a willingness to

testify on behalf of the other defendant should the trial be severed. The Court denied the motion for severance and the Court of Appeals reversed citing Echeles. The Court stated: "At the trial, Jordan's testimony was sought by Shuford in regard to a crucial fact on which the Government and Shuford were in sharp disagreement, namely the precise nature of Shuford's instructions to Long regarding billing practices. Shuford testified that he advised Long that the laboratory could bill patients for missing appointments, but he added the admonition that these items should be handled in a manner as not to appear in later litigation or settlement negotiations. Long, in contrast, testified to a version that was significantly different. He strongly suggested that Shuford was intending to use the misleading bills to enhance his clients' recoveries.

"Thus, the situation presented to the jury was that if they credited Long, then they could find that Shuford intended to falsify the therapy bills submitted to the Government. On the other hand, if they believe Shuford, they could see him as an innocent victime of long failure to follow instructions. Plainly, the guilt or innocence of Shuford hinged, in large measure, on the outcome of this credibility dispute.

"No other witness testified regarding Shuford's instructions to Long. Indeed the only other potential witness with direct knowledge of this phase of the case was Jordan who, in the absence of a severance, declined to take the stand. And the Fifth Amendment gave Jordan the right not even to be called to the stand so long as he was a defendant. ... This right extends so far as to forbid not only the Government, but even Shuford from calling Jordan to the stand. ... However, if Jordan's case were severed, while he would retain the privilege against self-incrimination, as a witness, he would no longer have the right not to be called to the stand. . . . Thus, absent Jordan's willingness to waive his Fifth Amendment right while

joined as a defendant with Shuford, severance was the only way of affording Shuford any possibility of persuading Jordan to testify."

Therefore, as in the instant case Cason chose to stand on his Fifth Amendment right to not testify at the trial and it would have been gross prejudicial for petitioner to call him to testify. However, Cason's testimony was essential because Peabody not only was surprised at the claim that he was given $250.00 prior to becoming a Member of the Board of Education by a man that he had never met or seen before, but vigorously denied such claim with the support of Cason. It appears, therefore, that the Shuford and Echeles doctrines were abandoned by the Seventh Circuit in its Order for which the petitioner is seeking review.

Had the Government not opposed petitioner's motion for severance and/or motion for continuance with respect to the alleged gifts from Kammermeyer to Cason, then petitioner would have been in a position to at least attempt to combat the testimony of Kammermeyer concerning the $500.00, which testimony even to the trial Court was of a very dubious nature.

Thus, even if this Court were to rule that the initial joinder of the defendants and issues were proper, it appears that because of the surprise testimony both to petitioner and to the Government, a severance should have been granted upon such testimony in line with the continuing duty to grant a severance when the interest of justice so requires in accordance with Schaeffer cited above.

The basic issue involved the claim by petitioner that the trial Court should have either dismissed both counts against him, or granted him a new trial as to both counts since the "surprise evidence" was not related to Count 11 (the conspiracy count) until after the jury had returned its verdict, and postrial motion and affidavits had been filed.

In arguing that the so-called "gifts" of the

calculator and tape recorder, the alleged "gift" of $250.00 to Cason for petitioner prior to the time petitioner had ever met Kammermeyer, and the alleged "gift" of golf clubs, constituted "over acts" and were therefore admissible under Count 11, the Government failed to take into account that during the trial, these matters were not alleged as "overt acts," but rather as substantive offenses under Count 21, and testimony regarding these items were only admissible under Count 21. In other words, had Count 21 been dismissed such testimony would never have been admitted.

The trial Court accepted the argument that the surprise evidence constituted overt acts in connection with the alleged conspiracy. Had petitioner known during the trial that this evidence was for purposes of showing overt acts in connection with the alleged conspiracy, he could have at least met the issue head on. However, as stated previously, the "overt acts" concept as it relates to this surprise evidence did not find fruition until it became reasonably clear that the use of this evidence in connection with Count 21 would be fatal.

Petitioner urges that this Court grant him an opportunity to confront his accuser whether or not such surprise evidence is regarded as substantive evidence or "overt acts."

CONCLUSION

The basic notion of an accused receiving a fair trial is so fundamental in our system of jurisprudence that it hardly needs reiterating. For the reasons set forth above, petitioner strongly believes that he was denied a trial of acceptable quality and therefore believes that his trial was unfair.

In knowing the precise accusations against him, the introduction of surprise testimony not known to either petitioner or the Government, not being able to refute certain evidence (alleged

gift of $250.00) because a line in that evidence was a co-defendant who could not be called to the stand by anyone, acts alleged as substantive offenses during the trial becoming over acts after the trial, and a broad brush being applied to all defendants are among the reasons why petitioner believes that as a matter of law the trial against him in this cause was unfair.

Therefore, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Edward L. Welch

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CRIMINAL NO. 74-97-E
CHARLES MERRITTS, SR., RAYMOND CASON, LEONARD JOHNSON, DR. FRED KIMBROUGH, ROOSEVELT PEABODY, HARRY THARP, et. al.,	)	
Defendants.	)	

O R D E R

Now before the Court is defendant Roosevelt Peabody's Post-Trial Motion in which the defendant requests a new trial.

In Count XXI, Peabody was convicted of conducting and participating in the affairs of the School Board, District 189, through a pattern of racketeering activity. This pattern of racketeering activity included at least two acts of racketeering activity. One of the acts of racketeering activity clearly was the conspiracy alleged in Count XI. It is far less clear what constituted the other act of racketeering activity. At the trial, Government adduced proof which tended to show that Peabody had either received or attempted to receive a washer and dryer, a $500 payment made to Raymond Cason to be divided among Peabody and Tharp, golf clubs, and a calculator. The Government concedes that it was unaware of the $500 payment, the golf clubs, and the calculator prior to the time James W. Kammermeyer testified at time of trial. In addition, the closing argument of the Assistant United States Attorney discussed both the washer and dryer and the calculator.

Peabody claims that he cannot be convicted on the basis of charges that are not included in the indictment and that there was a fatal variance between the charge contained in the indictment and the proof adduced at trial. A variance between indictment and proof is immaterial unless the substantial rights of the accused have been prejudiced. Berger v. United States, 295 U.S. 78 (1935); Troupe v. Seby, 416 F.2d 514 (9th Cir. 1969); Gay v. United States, 408 F.2d 923 (8th Cir. 1969), cert. denied 396 U.S. 923; Robinson v. United States, 333 F.2d 950 (5th Cir. 1964), cert. denied 379 U.S. 921. A variance between an indictment and the evidence is not material unless it is of such a substantive character as to mislead the accused in preparing his defense or place him in second jeopardy for the same offense. United States v. Pile, 256 F.2d 954 (7th Cir. 1958); United States v. Rosenblum, 176 F.2d 321 (7th Cir. 1949). Whether a variance is prejudicial must be determined on the facts of each case. United States v. Russano, 257 F.2d 712 (2d Cir. 1958).

Counsel for defendant Peabody reiterated throughout the trial his surprise as the evidence disclosed certain other instances of misconduct on the part of Peabody. Counsel for defendant Peabody seems to acknowledge that he knew of the allegations of the washer and dryer prior to the time of trial, but that he was unaware of the golf clubs, the $500 payment and particularly the calculator.

The Court feels that the introduction of evidence of other acts of misconduct on the part of Peabody constituted a fatal variance as to Count XXI and that Peabody was truly surprised thereby. For these reasons, defendant Peabody's Motion for a New Trial is hereby GRANTED as to Count XXI.

Count XI stands in a different posture. In essence, that Count alleged that Peabody conspired to obtain property under color of official right in violation of 18 U.S.C. §1951. Several overt acts were alleged. Peabody contends that there was a fatal variance as to this conspiracy count because

evidence of overt acts not named in the indictment was admitted at the trial. A conspiracy conviction, however, may be sustained upon a showing of overt acts in furtherance of the conspiracy even if the overt acts were not alleged in the indictment. United States v. Fassoulis, 445 F.2d 13 (5th Cir. 1971); United States v. Armone, 363 F.2d 385, 400 (2d Cir. 1966), cert denied 385 U.S. 957; Napolitano v. United States, 340 F.2d 313, 314 (1st Cir. 1965); Culp v. United States, 131 F.2d 93, 100 (8th Cir. 1942). Moreover, there was sufficient evidence to warrant the jury's finding based upon certain overt acts which were named in the indictment. Therefore, a new trial as to Count XI is not warranted.

Therefore, the Court hereby orders that the defendant Peabody be granted a new trial as to Count XXI only.

DATED: Aug. 13, 1975. .

(s) James L. Foreman
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Argued February 22, 1977

April 15, 1977

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. A. SHERMAN CHRISTENSEN, Senior District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. Nos. 75-1677 through 75-1681, and 76-1761 RAYMOND CASON, LEONARD JOHNSON, DR. FRED KIMBROUGH, ROOSEVELT PEABODY, HARRY THARP, and BEN PHILLIPS, JR., Defendants-Appellants.	) Appeals from the) United States Dist-) rict Court for the) Eastern District of) Illinois.) No. 74-CR-97-E) James L. Foreman, Judge,

ORDER

These appeals are from jury verdicts of conviction of the defendants for participation in a kickback conspiracy involving the Board of Education of East St. Louis, Illinois. Defendant Ben Phillips, Jr., whose trial was severed from that of the others, was charged with violation of 18 U.S.C. §§ 1951 and 1952. The other defendants were charged,

*The Honorable A. Sherman Christensen, United States Senior District Judge for the District of Utah at Salt Lake City, is sitting by designation.

in a twenty-one count indictment, with various violations of 18 U.S.C. §§ 2, 1341, 1623, 1951, 1961, 1962, and 1963. Defendants Charles Merritts, Sr., Harry Tharp, Dr. Fred Kimbrough, and Roosevelt Peabody were members of the school board. Defendants Leonard Johnson and Raymon Cason were, respectively, the business manager and the purchasing agent for the East St. Louis School Board. Phillips was allagedly employed by one of the vendors involved for the purpose of "laundering" money paid to Merritts.

The Government's chief witnesses were James W. Kammermeyer and Marvin C. Schwartz, vendors doing business with School District No. 189. Both witnesses were granted immunity from prosecution in exchange for their testimony. Kammermeyer and Schwartz both testified to the existence of the kickback scheme, and to numerous meetings with the defendants to discuss arrangements. Involved in the operation of the scheme were the use of fictitious invoices, fictitious purchase orders, and numerous payoffs by the vendors, in goods as well as money, some of the latter being laundered through Phillips.

The defendants have argued many points as error, and we will address each in turn. We do not, however, find any of their arguments to be of merit.

Defendant Phillips was charged with aiding and abetting Merrits in obtaining property from a vendor, with the vendor's consent, induced under color of official right which affected commerce, in violation of 18 U.S.C. § 1957 and § 1952, between June 1973 and December 1973. At Phillips' separate trial Kammermeyer testified that Phillips was employed to serve as payee of Kemmermeyer's checks for money paid to Merritts. Phillips would cash the checks and deliver the money to Merritts. Kammermeyer set up a tax escrow account for Phillips of roughly thirty percent of these amounts. Phillips' first objection is to the receipt of Kammermeyer's record book into evidence under the business records exception to the hearsay rule. The book contained records of kickback payments and the tax escrow.

Phillips claims that it was improperly admitted because it was not made as a regular part of Kammermeyer's business. This contention is without merit. Kammermeyer testified that he was the custodian of the book and that the entries were made by him or at his direction. He further testified that making kickbacks was not only a part of his business, but a very high percentage of that business. The situation is clearly included in both the Federal Business Records Act, 28 U.S.C. § 1732(a), and Federal Rule of Evidence 803(6); its reliability was thus established.

Phillips next claims that an effect upon commerce was not sufficiently proved. Kammermeyer's testimony that he made purchases from suppliers in states other than Illinois and Missouri and assigned his "Accounts Receivable" outside these states is sufficient to satisfy the commerce element of the Hobbs Act. In Stirone v. United States, 361 U.S. 212 (1960), the Supreme Court stated that the broad language of the Hobbs Act "manifest[s] a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion . . . ." 361 U.S. at 215. This court has further held that the commerce element is satisfied where there exists a "realistic probability that an extortionate transaction will have some effect on interstate commerce," even though the record shows no actual effect. United States v. Staszcuk, 517 F.2d 53, 60 (7th Cir. 1975). In the instant case, there was sufficient evidence to support the commerce element of the charge.

In his final argument Phillips contends that the district court erred in reopening the prosecution's case in rebuttal for newly discovered evidence. He contends that this evidence had been in the Government's possession and, in fact, used as an exhibit in a previous trial. This assertion is completely unsupported by the facts. We find no abuse of discretion in the court's permitting the Government to reopen rebuttal.

Merritts, tried with the other defendants, is not a party to this appeal. Various defenses were

raised by some or all the defendants in the second case. We will address each separately.

Defendants contend that an agent of the Federal Bureau of Investigation was improperly present in the grant jury room during its consideration of this case, for the purpose of rendering technical assistance to the grand jury. It has not been asserted that the agent was present during the grand jury's deliberation or voting on the indictment. Moreover, this claim is totally unsupported, as no evidence has been submitted by defendants to indicate his presence.

We find the challenge to the trial jury's array, that there was a too-high percentage of women, to be similarly without merit. The district court held an evidentiary hearing on this issue and found no prima facie showing of wrongdoing. There was no showing of knowing and intentional exclusion of any juror based upon race, sex, age, or other factor.

Defendants argue that because the evidence in this case was so lengthy and complicated, and because there were so many defendants involved, their trials should have been severed. The trial court carefully cautioned the jury each time testimony was received for merely a limited purpose or against only certain defendants, and carefully instructed the jury before it retired. This trial was a long one -- two weeks. If severance had been granted, it would necessitate six separate complicated trials with duplicitous testimony. Severance is a matter within the sound discretion of the trial court; under these circumstances we cannot conclude that the district court abused this discretion.

The evidence presented by the prosecution was sufficient to establish, independent of hearsay declarations by any of the defendants, a continuous scheme of extortion to which all the defendants were joint venturers. Once such a joint venture has been established, hearsay declarations made in furtherance of the scheme by any member are admissible against another member. United States v. Buschman, 527 F.2d 1082 (7th Cir. 1976). Such hearsay

declarations were, thus, properly admitted into evidence. Defendants contend that there existed, if any, only multiple conspiracies rather than the one single conspiracy charged. As previously indicated, the evidence sufficiently showed one single scheme to extort kickbacks from the vendors. Moreover, there was sufficient evidence to prove that those defendants charged with conspiracy to extort, Merritts, Kimbrough, Peabody, and Tharp, did so conspire. The evidence shows that in May 1974 three of the four met at Kammermeyer's office, the fourth being called on the telephone, to discuss the manner in which to carry out the conspiracy. During this meeting all four either demanded payment from Kammermeyer, or gave instructions for him to follow in furtherance of the conspiracy. This evidence shows that all knew of and actively joined the conspiracy. It is well settled that the parties to a conspiracy may change; one can leave a conspiracy or join an ongoing one. This does not mean that there are separate conspiracies. United States v. Varelli, 407 F.2d 735 (7th Cir. 1969). Thus the contentions of Peabody and Tharp, who did not become school board members until April 1974, after the initial dates charged in the indictment, that they cannot be charged with that conspiracy are without merit.

Defendants argue that they were prejudiced by references in the Government's opening statement that it would prove its case through tape recordings of the defendants. These tapes, made by bugging one of the testifying vendors during meetings with defendants, were never offered by the Government for admission. The Government claims that this was due to their poor sound quality, the necessity for complicated editing, and resulting problems of establishing a foundation. Considering the trial court's instructions to the jury, remarks by the Government attorney that statements by counsel are not evidence, and the rest of the evidence adduced, we cannot say that these references were manifestly prejudicial to the defendants. Frazier v. Cupp, 394

U.S. 731, 736 (1969); United States v. Woodring, 446 F.2d 733, 737 (10th Cir. 1971).

These same tapes were offered into evidence by defendant Kimbrough as cross-examination of Kammermeyer. Several of his codefendants objected to their admissibility on grounds of prejudict to them, Kimbrough's lack of standing to move for their admission, and lack of proper foundation. The Government also objected to their use for reasons that they were beyond the scope of direct examination of Kammermeyer, that they were of poor sound quality, and that they did not include all relevant time periods. We find that the trial court did not abuse its discretion to limit the scope of cross-examination in collateral matters. United States v. Bender, 218 F.2d 869, 873-74 (7th Cir. 1955), cert. denied, 349 U.S. 920 (1955); United States v. Lehman, 468 F.2d 93 (7th Cir. 1972), cert. denied, 409 U.S. 967 (1972); United States v. Hanahan, 442 F.2d 649, 655 (7th Cir. 1971).

These tapes, which were marked exhibits but never introduced as evidence, were labeled with various defendant's names. They were inadvertently taken with the jury during its deliberations. Defendants claim that they were prejudiced by this incident. The jury, however, never heard the tapes. Within fifteen minutes after the jury retired, a note from the forelady was delivered to the judge asking whether the tapes had been admitted and for an explanation why the jury had not heard them. They were almost immediately recovered. Defendant's objections are directed to the fact that the jury saw their names on the tapes; it never heard the tapes. Although delivery to the jury of an exhibit, not admitted into evidence is regrettable and constitutes error, it only requires reversal if there is a possibility that the error was prejudicial. United States v. Grady, 185 F.2d 273 (7th Cir. 1950); Osborne v. United States, 351 F.2d 111 (8th Cir. 1965). The nature of these exhibits, tape recordings, weighs heavily against the possibility of their causing prejudice. Unlike other types of

exhibits, their contents are not susceptible to observation without a device with which to play them back. Because the jury only had them a very short time, and because they never hear them, we cannot say that it was "substantially swayed by the error." Kotteakos v. United States, 328 U.S. 750, 765 (1946).

Defendant Cason claims prejudicial error occurred when he was misidentified by a witness brought by the prosecution to impeach the testimony of Johnson. The purpose to be served by the witness was to identify Johnson as the man to whom Kammermeyer instructed him to give a set of golf clubs. Instead, when he made the courtroom identification, the witness pointed to Cason, who did not testify at the trial. Cason claims that this violated his right to choose whether or not to testify, and that he was not given an opportunity to cross-examine the witness. In view of what occurred following the incident, we do not find that sufficient prejudice resulted to require a mistrial. After the misidentification, the witness was immediately excused, his testimony stricken, and the jury admonished to entirely disregard it. The defense did not then attempt to cross-examine the witness.

All defendants argue that there was insufficient evidence to support their convictions. We find, however, that the evidence adduced does not support this claim, and was sufficient to support the jury's verdict. It is not the function of this court to weigh the credibility of the witnesses' testimony; that is the function of the jury.

In Count XXI defendants were charged with violations of 18 U.S.C. §§ 2, 1961, 1962, and 1963, prohibiting conduct involving a pattern of racketeering activity. This count incorporated by reference some of the other counts of particular instances of racketeering. Because some of the evidence adduced at trial involved conduct not specifically charged in the other counts, defendants argue that there was a variance of proof from the indictment.

The policy behind not permitting proof to vary from what is charged in the indictment is twofold:

to protect against the possibility of double jeopardy and to enable the defendant to adequately prepare a defense. In looking to the facts of this case, it can be seen that this policy has been served. There is no danger that defendants will be tried again for these charges, as the indictment was sufficiently specific as to the time period and alleged violations. Defendants were able to adequately prepare their defense. They had the opportunity for ample discovery, and the kickback payments proved at trial were violations of 18 U.S.C. §§ 1951 and 1961 charges existing throughout the indictment. Sections 1961, 1962, and 1963 involve a "pattern" of racketeering conduct. The Government is not prohibited from proving overt acts, other than those charged in the indictment, to show this pattern of activity.

The judgments in these appeals are affirmed.

Supreme Court, U. S.
FILED
OCT 27 1977
MICHAEL RODAK, JR., CLERK

Nos. 76-1776, 76-6907, and 76-6926

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROOSEVELT PEABODY, PETITIONER

v.

UNITED STATES OF AMERICA

RAYMOND CASON, PETITIONER

v.

UNITED STATES OF AMERICA

HARRY THARP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1776

ROOSEVELT PEABODY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 76-6907

RAYMOND CASON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 76-6926

HARRY THARP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 31-38)[1] is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1977. Petitions for rehearing with suggestions for rehearing *en banc* were denied on May 13, 1977. The petitions for a writ of certiorari in Nos. 76-1776 and 76-6907 were filed on June 13, 1977. The petition in No. 76-6926 was filed on June 14, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was a fatal variance between the government's proof at trial and the counts charging conspiracy (petitioners Peabody and Tharp) and racketeering (petitioner Tharp).

2. Whether the district court erred in refusing to grant the motions of petitioners Peabody and Tharp for a severance.

3. Whether hearsay statements of petitioner Cason and co-defendant Johnson were properly admitted into evidence against petitioner Tharp.

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[1] All "Pet. App." designations refer to the Appendix in No. 76-1776.

4. Whether petitioners Tharp and Cason were deprived of a fair trial when a government witness misidentified petitioner Cason as the person to whom he delivered a "kickback."

5. Whether petitioners Tharp and Cason were prejudiced by the prosecutor's reference in opening argument to tape recordings that were never introduced into evidence and by the inadvertent (and immediately corrected) submission of the recordings to the jury.

STATEMENT

On October 24, 1974, petitioners and four co-defendants were indicted in the United States District Court for the Eastern District of Illinois for various offenses related to the conduct of the affairs of the East Saint Louis School Board. Petitioners Peabody and Tharp were members of the board. Petitioner Cason was the school district's purchasing agent. Charles Merritts was president and Fred Kimbrough was a member of the board. Leonard Johnson was the school district's business manager. Ben Phillips was also a board member; his trial was severed.

The 21-count indictment charged offenses beginning in 1972 and continuing throughout most of 1974. Before trial nine of the counts, charging offenses before 1974, were severed. The counts remaining were numbers 8 and 11-21. Count 8 charged Merritts and Johnson with mail fraud, in violation of 18 U.S.C. 1341. Count 11 charged Merritts, Kimbrough, petitioner Peabody and petitioner Tharp with conspiracy

to extort money from a supplier doing business with the school district, in violation of 18 U.S.C. 1951. Counts 12, 13, and 17 charged Merritts with substantive violations of Section 1951. Counts 14, 15, and 16 charged, respectively, petitioner Cason, Johnson, and Kimbrough with substantive violations of Section 1951. Counts 18, 19, and 20 charged, respectively, petitioner Cason, Johnson, and Merritts with perjury before the grand jury investigating the extortion scheme, in violation of 18 U.S.C. 1623. Count 21 charged petitioners and their co-defendants with having engaged, in conducting the affairs of the school board, in acts of extortion and mail fraud amounting to a pattern of racketeering activity, in violation of 18 U.S.C. 1961-1963.

Following a jury trial, verdicts of guilty were returned on all counts except Count 17 (involving Merritts). Petitioners Peabody and Tharp were accordingly convicted on Count 11 (conspiracy) and Count 21 (racketeering).[2] Petitioner Cason was convicted on Count 14 (a substantive violation of 18 U.S.C. 1951), Count 18 (perjury), and Count 21. Petitioner Peabody was sentenced to two years' imprisonment and a fine of $5,000. Petitioner Tharp was sentenced two years' imprisonment and a fine of $5,000 on Count 11; on Count 21 he was sentenced to three years' imprisonment, all of which was suspended in

[2] The district court granted petitioner Peabody a new trial on Count 21 on the ground that there had been a variance between that count as drawn and the government's proof at trial (Pet. App. 28-30).

favor of probation, to be served consecutively to the sentence on Count 11. Petitioner Cason was sentenced to 18 months' imprisonment and a $5,000 fine on Count 14; to 18 months' imprisonment on Count 18, to be served concurrently with the sentence on Count 14; and to three years' imprisonment on Count 21, all of which was suspended in favor of probation, to be served consecutively to his other sentences. The court of appeals affirmed (Pet. App. 31-38).

The evidence at trial showed that in 1974 petitioners and their co-defendants were engaged in a scheme by which they unlawfully obtained money paid by the school district upon false invoices approved by petitioners and also "kickbacks" from those doing business with the school district. In March 1974 Marvin Schwartz, an independent contractor with the school district, submitted $4,498.48 in false invoices on instructions from co-defendants Merritts and Johnson. The school district paid the invoices, and on April 11, 1974, Schwartz returned $4,000 of the money to Merritts for his reelection campaign (Tr. 886-895). James Kammermeyer, president of World Wide Industries, Inc., made numerous "kickback" payments to petitioners and their co-defendants between March and September 1974 in consideration of supply contracts with the school district.[3]

[3] For example, on April 8 Kammermeyer gave Merritts $500 (Tr. 1376-1377). On April 10 he gave Cason $500 to be divided equally between Peabody and Tharp (Tr. 1372, 1377-1378). Kammermeyer also purchased a set of golf clubs in April that he gave to co-defendant Johnson for delivery to

ARGUMENT

1. Kammermeyer's testimony regarding "kickbacks" to petitioners and the other board members included mention of (1) a calculator and a tape recorder given to petitioner Peabody; (2) a request by Peabody for a washer and a dryer; (3) a set of golf clubs given to Johnson for delivery to petitioner Tharp; and (4) $500 given to petitioner Cason to be divided equally between petitioners Peabody and Tharp (Tr. 1362-1366, 1372, 1377-1378, 1414-1415). These particular "kickbacks" were not mentioned in the indictment. Petitioners Peabody (Pet. No. 76-

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Tharp (Tr. 1414-1415). In early May, at a meeting attended by Kammermeyer, co-defendant Kimbrough, and petitioners Tharp and Peabody, "kickback" percentages were discussed and Kammermeyer gave Peabody a tape recorder and a calculator (Tr. 1362-1366). In June and July, Kammermeyer cashed several World Wide Industries checks payable to him and delivered the proceeds to petitioners or their co-defendants. See Tr. 1378, Gov't Ex. 8C (May 30 check for $600, $500 of which was delivered to Cason); Tr. 1381, Gov't Ex. 8D (June 13 check for $750, $500 of which was delivered to Johnson); Tr. 1382, Gov't Ex. 8E (June 11 check for $1,200, all of which was delivered to Merritts); Tr. 1383, Gov't Ex. 8F (June 10 check for $1,500, $1,000 of which was delivered to Johnson and $500 of which was delivered to Cason); Tr. 1385, Gov't Ex. 8G (June 21 check for $2,500, all of which was delivered to Merritts); Tr. 1385-1386, Gov't Ex. 8H (June 25 check for $1,250, $1,000 of which was delivered to Johnson); Tr. 1389, Gov't Ex. 8J (July 19 check for $1,000, $500 of which was delivered to Johnson and $500 of which was delivered to Cason); Tr. 1390-1391, Gov't Ex. 15 (check for $5,500, $1,500 of which was delivered to Johnson and $1,000 of which was delivered to Cason). In early August Kammermeyer gave co-defendant Kimbrough a check for $5,000 and $250 in cash (Tr. 1416-1418).

1776, pp. 13-21) and Tharp (Pet. No. 76-6926, pp. 18-22) contend that their use in evidence at trial resulted in a fatal variance between the government's proof and the crimes charged in Counts 11 (the conspiracy) and 21 (racketeering) of the indictment.

Petitioner Peabody raised this issue in a post-trial motion for a new trial, which the district court granted in part, ruling that the evidence had caused a variance with respect to the racketeering count but not the conspiracy count (Pet. App. 28-30). Petitioner Peabody continues to claim that he is entitled to a new trial on the conspiracy count as well. Petitioner Tharp, unlike petitioner Peabody, did not move for a new trial in the district court; he now seeks a new trial on both counts.

Petitioners' claims are unpersuasive. Count 11 charged petitioners Peabody and Tharp, as well as co-defendants Merritts and Kimbrough, with conspiring to obtain property from Kammermeyer with Kammermeyer's consent induced under color of official right, in violation of 18 U.S.C. 1951.[4] Nine overt acts, "among other acts," were specified: (1) in May 1974 petitioner Tharp telephoned Kammermeyer to announce a forthcoming visit by school board members to the latter's office; (2) both petitioners and Kimbrough went to Kammermeyer's office; (3, 4) there they told Kammermeyer that he must make "kickbacks" and that the payments were to be made

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[4] We have lodged a copy of the indictment with the Clerk of this Court.

to Merritts; (5) Kammermeyer called Merritts, who ratified the instructions and said that the payments would be shared by everyone; (6) Kammermeyer paid Merritts $30,000 pursuant to the arrangement; (7) in July 1974 Merritts, Kimbrough, and petitioner Peabody discussed the "kickback" payments; and (8, 9) in September and October 1974 petitioner Tharp met with Kammermeyer and discussed further "kickback" arrangements. Each of these overt acts (with only minor variations in the dates and the amount of "kickbacks" paid) was proven through the testimony of Kammermeyer (Tr. 1316, 1362-1366, 1373, 1378-1391, 1399-1417). See Pet. App. 34-35, 37. That the government introduced proof of other overt acts as well did not cause a variance, for "the Government is not limited in its proof at trial to those overt acts alleged in the indictment." *United States* v. *Adamo*, 534 F. 2d 31, 38 (C.A. 3), certiorari denied *sub nom. Kearney* v. *United States*, 429 U.S. 841. See also, *e.g.*, *United States* v. *Quesada*, 512 F.2d 1043, 1046 (C.A. 5), certiorari denied, 423 U.S. 946; *United States* v. *Clay*, 495 F.2d 700, 706 (C.A. 7), certiorari denied, 419 U.S. 937; *Napolitano* v. *United States*, 340 F.2d 313, 314 (C.A. 1).

The foregoing decisions recognize that "[t]he essence of the charge [of conspiracy] is a criminal agreement." *United States* v. *Armone*, 363 F.2d 385, 400 (C.A. 2), certiorari denied, 385 U.S. 957. "[T]he Government is under no obligation to prove every overt act alleged" in the indictment (*United States* v. *Adamo*, *supra*, 534 F.2d at 38; see also *United*

States v. *Williams*, 474 F.2d 1047 (C.A. 5)): proof of any one overt act is enough (*United States* v. *Cassell*, 452 F.2d 533, 536 (C.A. 7); *Bradford* v. *United States*, 413 F.2d 467, 469 (C.A. 5)). Indeed, in acknowledgement of the fact that the illegal agreement is the essence of the crime of conspiracy, it has frequently been held that even when the government fails to prove any overt act alleged in the indictment, but proves an unalleged overt act, the variance is not fatal. *E.g.*, *United States* v. *Adamo*, *supra*, 534 F.2d at 38-39; *United States* v. *Fassoulis*, 445 F.2d 13, 19 (C.A. 2), certiorari denied, 404 U.S. 858; *Brulay* v. *United States*, 383 F.2d 345 (C.A. 9), certiorari denied, 389 U.S. 986; *United States* v. *Armone*, *supra*; *Napolitano* v. *United States*, *supra*; *United States* v. *Negro*, 164 F.2d 168, 173 (C.A. 2); *Culp* v. *United States*, 131 F.2d 93, 100 (C.A. 8); *Worthington* v. *United States*, 1 F.2d 154, 155 (C.A. 7), certiorari denied, 266 U.S. 626; but cf. *United States* v. *Davis*, 533 F.2d 921, 929 n. 11 (C.A. 5).

In short, here the government proved all nine overt acts alleged in the indictment to have furthered the conspiracy; the introduction of evidence regarding additional overt acts did not defeat the government's case on Count 11.

It is the same with regard to petitioner Tharp's claim of a variance under Count 21. That count charged that petitioners and their co-defendants

> unlawfully and knowingly did conduct and participate directly and indirectly, in the conduct of [the school board's] affairs through a pattern of

> racketeering activity, in that the defendants did unlawfully affect commerce by obtaining property from [Kammermeyer, with his] consent induced under color of official right, said acts being a violation of * * * Section 1951 * * *. In this regard the Grand Jury incorporates by reference Counts VIII, XI, XII, XIII, XIV, XV, and XVI of this indictment. * * * [5]

Petitioner Tharp's claim is not that the indictment failed to state an offense under the Anti-Racketeering Act; rather, he asserts that there was a variance between the proof and the indictment caused by the government's introduction into evidence of "kickbacks" that were not specified in the indictment. But just as the government is not limited to proof of the overt acts charged in an indictment for conspiracy, there is no reason to limit the government's proof in an Anti-Racketeering Act case to the acts amounting to "a pattern of racketeering activity" that are mentioned in the indictment. Here the government proved numerous payments by Kammermeyer to Merritts that were made at the insistence of petitioner Tharp and his co-defendants and that were to be shared among them. These payments were alleged in Count 21 by that count's incorporation by reference of Count 11, which charged that pursuant to the conspiracy among the defendants Kammermeyer paid "$30,000

[5] Counts 12 through 16 (each of which the government proved at trial) charged petitioner Cason and co-defendants Merritts, Johnson, and Kimbrough with substantive violations of Section 1951 stemming from their receipt of "kickbacks" from Kammermeyer.

more or less" to Merritts for distribution among the school board members. Each payment exacted from Kammermeyer could have been considered a separate act of racketeering [6] for purposes of showing "a pattern of racketeering activity" under Section 1962 (see *United States* v. *Parness*, 503 F.2d 430, 438 (C.A. 2), certiorari denied, 419 U.S. 1105; *United States* v. *Moeller*, 402 F. Supp. 49, 58 (D. Conn.)), and the fact that petitioner Tharp may have committed and the government offered proof of other acts that might also have been considered among those constituting "a pattern of racketeering activity" did not vitiate the conviction. See *United States* v. *Parness*, *supra*.[7]

2. Petitioners Peabody (Pet. No. 76-1776, pp. 21-26) and Tharp (Pet. No. 76-6926, pp. 34-37) claim that the district court erred in not granting their motions for a severance. Each argues that if he were tried separately, co-defendants Merritts and Cason might have testified favorably to him.

The general rule is that "persons jointly indicted should be tried together." *United States* v. *Kahn*, 381 F.2d 824, 838 (C.A. 7), certiorari denied, 389 U.S.

[6] The district court correctly charged the jury that to convict petitioners Peabody and Tharp on Count 21 it would have to find beyond a reasonable doubt that each committed at least two criminal acts in violation of 18 U.S.C. 1951 (Tr. 2471).

[7] We accordingly believe that the district court erred in granting petitioner Peabody a new trial on Count 21. In any event, petitioner Peabody's windfall does not entitle petitioner Tharp (who did not join in petitioner Peabody's post-trial motion in the district court) to a new trial on the racketeering charge.

1015. This is particularly so where, as here, all of the defendants are charged with participation in the same conspiracy. *Ibid.* In such a case, to succeed on a motion for a severance "[t]he moving party must show that he will be unable to obtain a fair trial without severance, not merely that a separate trial will offer a better chance for acquittal" (*United States* v. *Allstate Mortgage Corp.*, 507 F.2d 492, 495 (C.A. 7), certiorari denied, 421 U.S. 999), and the disposition of such a motion is committed to the sound judgment of the trial judge, whose decision is reviewable only for an abuse of discretion. *Schaffer* v. *United States*, 362 U.S. 511.

The possibility that a co-defendant may be willing to testify favorably to the movant only if the latter is tried separately is one factor to be considered by the district court in passing on a motion to sever (*United States* v. *Shuford*, 454 F.2d 772 (C.A. 4)), but it does not, standing alone, inevitably require that the motion be granted. *United States* v. *Cruz*, 536 F. 2d 1264, 1267-1268 (C.A. 9); *United States* v. *Finkelstein*, 526 F.2d 517, 523-524 (C.A. 2), certiorari denied *sub nom. Scardino* v. *United States*, 425 U.S. 960; *United States* v. *Kahn*, *supra*, 381 F.2d at 841. The strength of the defendant's interest in a separate trial depends upon many factors, including the likelihood that his co-defendant will in fact testify and the significance of the exculpatory testimony that the defendant asserts will be forthcoming. *United States* v. *Finkelstein*, *supra*. Judged according to these standards, the district court's refusal to grant petitioners a severance was not an abuse of discretion.

Petitioner Peabody suggests (Pet. No. 76-1776, pp. 21, 25) only that Cason would have denied acceptance of one of the many "kickback" payments made by Kammermeyer—the April 10 payment to him of $500 to be divided equally between Peabody and Tharp (see note 3, *supra*). In light of the government's proof of many other "kickbacks" by Kammermeyer to all the defendants, this testimony can hardly be said to have been of such substantial value to petitioners as to require a severance.

Petitioner Peabody claims (Pet. No. 76-1776, p. 21) that he wished to call Merritts and Kimbrough simply to testify about "the operation" of the school board and does not indicate how such testimony would have aided his defense. Petitioner Tharp suggests (Pet. No. 76-6926, p. 34) that Merritts might have testified as he did before the grand jury, *i.e.*, that he knew of no wrongdoing by any board member. But Merritts was convicted of perjury for this very testimony (and the transcript of his grand jury testimony (Gov't Ex. 33) was accordingly before the jury in any case). Whether he would have been willing to repeat the same testimony under oath a second time is therefore doubtful, and the testimony would have been subject to impeachment by evidence of the perjury conviction in any event. In these circumstances,[8] the court of ap-

[8] *United States* v. *Shuford*, *supra*, and *United States* v. *Echeles*, 352 F.2d 892 (C.A. 7), relied upon by petitioners, are distinguishable. In each case the exculpatory testimony of a co-defendant would, if believed, have exonerated the defendant.

peals correctly ruled that the district court did not abuse its discretion in refusing to grant separate trials.[9]

3. Petitioner Tharp complains (Pet. No. 76-6926, pp. 23-29) that the district court erred in admitting evidence of hearsay statements of co-defendants Johnson and Cason, who were not charged with conspiracy. But the existence of a conspiracy count is not a prerequisite for the introduction of hearsay statements of co-defendants commonly engaged in an illegal scheme (*United States* v. *Snow*, 521 F.2d 730, 736 (C.A. 9), certiorari denied, 423 U.S. 1090; *United States* v. *Snyder*, 505 F.2d 595 (C.A. 5), certiorari denied, 420 U.S. 993; Fed. R. Evid. 801(d)(2)(D) and (E)); proof of a concert of unlawful activity is sufficient.

Here the government proved such a concert of action. The proof of petitioner Tharp's role in the conspiracy charged was plainly sufficient (see pages 5-6 n.3, *supra*), and the involvement of Cason and Johnson in the unlawful scheme was shown by their own dealings with witness Kammermeyer.[10] Moreover, the

[9] The trial was not so lengthy or complex as to have prejudiced petitioners. The government proceeded to trial only on those counts charging offenses committed during a relatively short time span in 1974 (page 3, *supra*). Moreover, as the court of appeals observed (Pet. App. 34), "[t]he trial court carefully cautioned the jury each time testimony was received for merely a limited purpose or against only certain defendants, and carefully instructed the jury before it retired."

[10] Cason and Johnson accepted payments from Kammermeyer (*e.g.*, Tr. 1372, 1378, 1381, 1383). Both Cason and Tharp met with Kammermeyer on July 24, 1974, to discuss the "kickbacks" (Tr. 1397-1398), and Tharp had earlier participated in a meeting with Kammermeyer at which the "kickbacks" were discussed (Tr. 1362).

jury was properly instructed as to the admissibility of the statements of co-conspirators,[11] and there was no need for the court to give a limiting instruction

[11] The court charged the jury (Tr. 2466-2467):

> In determining whether a conspiracy existed, the jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular defendant was a member of a conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that he was one of its members.
>
> Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of the members, then the statements thereafter knowingly made and the acts thereafter knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such a conspiracy, and in furtherance of some object or purpose of the conspiracy.
>
> Otherwise, any admission or incriminatory statement made or act done outside of court by one person may not be considered as evidence against any person who was not present and did not hear the statement made or see the act done.
>
> Therefore, the statements of any conspirator which are not in furtherance of the conspiracy or made before its existence or after its termination may be considered as evidence only against the person making them.

each time such testimony was introduced. *United States* v. *Buschman*, 527 F.2d 1082 (C.A. 7).

4. Petitioners Tharp (Pet. No. 76-6926, pp. 32-33) and Cason (Pet. No. 76-6907, p. 4) complain that they were prejudiced when a government witness, called to impeach co-defendant Johnson, incorrectly identified petitioner Cason (rather than Johnson) as the person to whom he had been instructed by Kammermeyer to deliver a set of golf clubs. As the court of appeals observed (Pet. App. 37), when this happened "the witness was immediately excused, his testimony stricken, and the jury admonished to entirely disregard it."

Petitioner Tharp asserts that he was prejudiced because he was alleged to have been the ultimate recipient of the golf clubs. Petitioner Cason claims that his inability to cross-examine the witness resulted in a denial of his right to choose whether or not to take the stand. As the court of appeals ruled, however, the district court's prompt action removed any basis for these claims. Indeed, petitioner Cason does not suggest how, on cross-examination, he could have discredited the witness's testimony any more than it already had been by the district court.

5. Petitioners Tharp (Pet. No. 76-6926, pp. 30-31) and Cason (Pet. No. 76-6907, p. 4) contend that they were prejudiced by the prosecutor's reference in his opening statement to tape recordings that were never introduced into evidence [12] and by the inadvertent sub-

[12] The government decided not to offer the tapes for introduction into evidence because their sound quality was poor. (Pet. App. 35).

mission of the recordings to the jury. The court of appeals correctly ruled (Pet. App. 35-37), however, that the one passing reference to the tapes in the government's opening statement (Tr. 726) was not prejudicial given the overall evidence of petitioners' guilt, as well as the district court's instructions (Tr. 2454) and the prosecutor's own caution (Tr. 2346) that statements by counsel are not evidence.

The tapes were indeed inadvertently delivered to the jury room, but the jury inquired about them within fifteen minutes after they had retired to deliberate, and the court had them removed and advised the jury that they were not evidence in the case (see Tr. 2489-2490). As the court of appeals noted (Pet. App. 36), the delivery to the jury of exhibits not admitted into evidence requires reversal only if the defendant is prejudiced. See *United States* v. *Bishop*, 492 F.2d 1361 (C.A. 8), certiorari denied, 419 U.S. 833; *United States* v. *Burket*, 480 F.2d 568 (C.A. 2). Here the jury never listened to the tapes, and petitioners' speculation that the jurors may have inferred that the tapes were damaging to them and had been suppressed on some technical ground does not constitute a showing of prejudice sufficient to warrant reversal.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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NO. 76-1776

IN THE SUPREME COURT OF THE

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UNITED STATES OF AMERICA,

Plaintiff-Respondent,

-vs-

ROOSEVELT PEABODY,

Defendant-Petitioner.

REPLY TO OPPOSITION TO PETITION

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GOVERNMENT'S OPPOSITION ASSERTS FACTUAL ERROR AND RAISES COMPLETELY NEW CONTENTION

At pages 7-8 of the Government's Opposition to Petition it is alleged that certain overt acts were alleged in the Indictment and that the proof at trial "in July 1974 Merritts, Kimbrough, and petitioner Peabody discussed the 'kickback' payments."

This allegation that the Government proved that in July 1974 Merritts, Kimbrough and petitioner Peabody discussed kickback payments is incorrect and totally without record support. No where is there record support for the allegation that petitioner Peabody discussed kickback payments with Merritts, Kimbrough and/or Tharp.

The Government appears to miss the point of Peabody's claim, namely, that he detrimentally relied upon the Government's representation and such detrimental reliance resulted in his not being able to defend himself at trial.

In addition, the Government in Footnote 7 at page 11 of its Opposition to Petition raises for the first time the claim that the District Court erred in granting Peabody a new trial with respect to Count XXI, choosing to refer to the District Court's action as a "windfall" to Peabody.

Thus, the Government neither comprehends nor addresses itself to the basic question which Peabody raises, namely, WHETHER OR NOT A CARDINAL TENET OF DUE PROCESS IS VIOLATED

WHEN BY ITS CONDUCT THE GOVERNMENT CAUSES A DEFENDANT TO RELY UPON CERTAIN GOVERNMENTAL REPRESENTATIONS AND SUCH REPRESENTATIONS ALTHOUGH INNOCENTLY MADE ARE FALSE AND THE DEFENDANT IS GROSSLY PREJUDICED THEREBY.

Clearly, the District Court knew of all defendants' reliance on the Government's representations as to the nature of the materials disclosed and the District Court felt that in fundamental fairness the Government had prejudiced Mr. Peabody's rights. More importantly, however, is the fact that even the Government trial attorney himself admitted surprise at the nature of the evidence which the Government put on to convict Mr. Peabody.

Peabody maintains that his rights were prejudiced by this Governmental misconduct, engaged in innocently, but also that he was prevented from testifying and defending himself as a result thereof.

Peabody reiterates his very strong belief that fundamental fairness dictates an opportunity for him to testify and defend himself. He did not cause the conduct about which he now complains.

Respectfully submitted,

Edward L. Welch